IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO. 404 OF 1999

1. Taki Ahmed Khalil Ahmed Khan)
2. Mohd. Ilias @ Manoj Yasin Ansari)
3. Nisar Ahmed Sadarali Ansari)
4. Shabir Hussein Ahmed Hussein Shaikh).. Appellants.

versus

The State of Maharashtra ..... Respondents.

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Shri A. Majeed Menon for all the accused.
Mrs. U.V.Kejariwal APP for State.

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CORAM ; V.G.PALSHIKAR &
ANOOP V. MOHTA, JJ.

DATED; 16TH SEPTEMBER, 2004.

ORAL JUDGMENT (Per Palshikar,J.);

1. Being aggrieved by the order of conviction passed by the Additional Sessions Judge, Gr. Bombay in Sessions Case No.1378 of 1993 under sections 144, 148 & 302, read with 149 of IPC on 14-7-1999 the appellants have preferred this appeal on the grounds mentioned in the memo of appeal as also orally canvassed before us.

2. With the assistance of the learned counsel for the accused and the learned Prosecutor, we have scrutinised the records of the case and re-appreciated the evidence on record.

3. The prosecution story as emerges from re-appreciation of evidence is that on 13-9-1993 around 3.30 p.m. some 8 to 10 persons were chasing one Jakir who was running ahead of them. One of the chaser tripped Jakir by leg. He fell on the ground and was assaulted and murdered. A complaint accordingly was made to the police. Police came on the scene and started investigation and at the information gathered arrested the accused and the present appellants/accused Nos.1 to 4 were prosecuted for murdering Jakir. The prosecution has examined as many as 13 witnesses in support of its case that the accused committed murder of Jakir.

4. The learned trial Judge on appreciation of this evidence came to the conclusion of guilt as mentioned above and proceeded to sentence them as mentioned above. The correctness of this order of conviction is canvassed before us by the learned counsel appearing on behalf of the accused. He pointed out inherent contradictions and defects in the testimony of these witnesses and contended that it is impossible to sustain the order of conviction on proper appreciation of the evidence of these persons. These submissions were countered by the learned A.P.P. Ms. Kejariwal by pointing out that the evidence was adequate and the

conviction was right. We will consider in extenso the evidence as is reappreciated by us.

5. P.W.1 is Manjur Ahmed who is the complainant, on the basis of whose complaint the investigation of this case was started. He states that he and victim Jakir were sitting in the library on 13-9-1993 when around 3.30 p.m. 8 to 10 persons came running into the lane known as stable street in Kamathipura, Bombay and were going towards Budh Vichar school. When they were at some distance from the library, Jakir saw them and he started running towards Ahmed Umer Mill. The witness then states that the crowd was chasing the victim Jakir and then the witness went into his workshop. After sometime came out to see Jakir murdered. He then says that the accused 2 to 4 were chasing Jakir and they were armed and proceeds to describe the arms in their hands. He categorically states that accused no.1 was not in the said crowd. The witness is extensively cross examined. It is pertinent to note however that though the witnesses in this case have categorically stated that they knew the accused persons for years together, being resident of nearby locality. The test identification parade was held by Nagpada police station where the accused persons were formally identified by the witness. Holding of such identification parade itself creates a doubt regarding

correctness and truthfulness of the prosecution version. According to the testimony of this witness therefore 8 to 10 persons were chasing Jakir. Accused no.1 was not a party. Accused nos. 2 to 4 were armed but could not state as to why these people were chasing Jakir. It is obvious from the testimony of this witness that he is not an eye witness to the assault. This witness further in his cross examination categorically admits that a person standing in front of library where the witness was standing at the relevant time cannot see what is happening in front of Iqbal Restaurant. It is an admitted position on record that the assault on Jakir took place in front of Iqbal Restuarant. The entire testimony of this witness therefore becomes doubtful.

6. P.w.2 Abdul Haiee is another witness who claims to be an eye witness to the incident. He also says that 8 to 10 persons came running into the stable street and started chasing Jakir . Of the 8 to 10 persons he identified accused nos.1 to 4 and stated the weapon which were in the hands of accused 2 to 4. This witness has been extensively cross examined and his cross examination is liable to be noted. This witness at the outset submits in his cross examination that the weapons which he has identified in the court were never shown to him earlier by the police. He saw them for

the first time in court after he had seen them in the hands of respective accused, at the time of incident. He submits that when his statement was recorded by the police, Manzooj Ahmed, Munir Ahmed, Mohd. Jamil and Shakil were present. This witness has stated in his examination-in-chief that while Jakir was running accused no.1 tripped him by leg and Jakir fell down and was assaulted by the other accused persons. But in his cross examination he has stated that:

> "Jakir ran towards Iqbal Restaurant and the said 8 to 10 persons armed with weapons ran after him. We also ran after them upto some distance. Accused no.1 Taki tripped said Jakir with his leg and Jakir fell down."

According to this witness, Jakir was being followed by group of 8 to 10 persons and that crowd was followed by the witness and yet he was able to see accused no.1 tripping Jakir and saw him falling down. It may be possible to see a person ahead of him falling down but it is not possible to see how he is tripped by leg. Jakir was taken to the hospital by this witness. His shirt was blood stained. In his examination-in-chief he says in para 3 that he was taking tea in Islamiya hotel. Mohamed Jamil was also with him. Jakir was reading paper in the library. The witness heard

commotion "Maro, Maro - Pakdo, Pakdo" and the witness along with Mohd. Ismail came out of the hotel. Then they saw Jakir started running towards stable street and 8 to 10 persons were chasing. He then states how accused no.1 tripped Jakir. He does not make any mention of the fact that after coming out of the hotel he started running after the mob and saw what he stated. Whereas in his cross examination he specifically contends that he had also gone after them upto some distance. What exactly was seen or done by the witness therefore becomes doubtful. This witness categorically claims that accused No.1 was not only present but was the person who tripped Jakir. It is exactly contrary to what has been claimed by P.w.1 who specifically contends that accused no.1 was not in the said group. The evidence of these two persons therefore creates a question as to what is the truth and as to who tripped Jakir. P.W.1 does not name accused No.1 of tripping Jakir. If P.w.2 is to be believed how he could see while running behind the assailants, one of them tripping Jakir. The testimony of these two witnesses therefore creates doubt regarding what exactly happened on that day.

7. P.w.3 is Mohamed Jamil who was sitting along with P.w.2 in the hotel around 3.30 on 13-9-1993 when the assault, as alleged, took place. He also submits that

he knows all the accused persons for last more than 15 years. Then he states that he heard shouts as done by P.w.2, they came out of the hotel as stated by P.w.2, Jakir was running, all the accused persons along with 5/6 more persons were running after Jakir. According to this witness they were armed with weapons. He is not clear at all as to who they were, who were armed. He does not identify any weapon with any particular accused. He then saw accused no.1 tripping Jakir with his leg. Jakir fell down and the witness out of fear went into his house. He is not therefore eye witness to the assault. He is unable to state which accused was armed with what weapon. He not only corroborates P.w.2 in saying that accused no.1 tripped Jakir with his leg but adds certain words to the assailants "Pakad le, pakad le"

8. P.w.2 has very categorically stated that the place of incident is exactly in front of Iqbal Restauraant. P.w.1 says that if we stand in front of library, we cannot see what happens in front of the hotel and therefore this witness saw him from Islamia hotel.

9. In the cross examination of this witness five contradictions have been noted. Even if we ignore the said contradictions, the question remains as to how P.w.1 could see the incident when according to this

witness the incident had occurred in front of Iqbal Restaurant. P.w.3 on his own admission went into his workshop and did not see the assault and therefore is not a witness to the assault. These three witnesses therefore are the eye witnesses according to the prosecution. It is pertinent to note, none of them stated as to why Jakir started running on seeing these assailants, why the assailants were running after Jakir, if Jakir was sitting in the library, how did this mob see him. The evidence of these three witnesses does not throw any light on the question basically why these persons wanted to assault Jakir. No reason is coming forward which can be remotely considered as the intention or motive.

10. P.w.4 is the panch witness to prove recovery of the clothes of the deceased. P.w.5 is the panch to prove seizure of the clothes of P.w.2 which were blood stained while carrying the victim to the hospital.

11. Then P.w.5 Ansari is again an eye witness according to the prosecution. This witness saw the assault but he does not attribute any weapon to any accused. He says that they were armed but does not tell the court as to which accused was carrying what weapon and then he says that the accused threw weapon on the spot and ran away. Therefore according to this

eye witness, weapons were lying at the spot after assault. This statement assumes significance when we consider the deposition of police officials in regard to recoveries/seizure of this alleged weapon.

12. P.w.7 is the father of victim. Apart from identifying the body of Jakir there is nothing in the evidence of this witness which can throw any light on the story of the prosecution. Then P.w.8 Shakil Ansari is yet another witness who claims to be an eye witness. He also does not mention as to which accused was carrying what weapon. In fact he does not say what happened to the weapon, where was he, and none of the other witnesses have noticed any other witness. P.w.1 does not speak of P.w.2 or P.w.3. P.w.2 and P.w. 3 does not speak of presence of P.w.1. P.w.6 and P.w. 8 does not mention of P.ws.1 to 3. The testimony of these witnesses therefore create reasonable doubt as to the presence of any of them and this doubt is further strengthen when we consider the testimony of the investigating officer.

13. P.w.9 is the Special Executive Magistrate who conducted test identification parade. Why it was held is not known, when all the witnesses say that they knew the accused persons for years together. P.w.10 is the witness who drew the map of the spot. There is no

dispute that the assault did take place where the map says it took place. The question is who assaulted Jakir ?

14. Then is the important testimony of P.w.11 PSI Bendale and the testimony of P.w.13 Dhavale the investigating officer. We will extensively advert to the evidence of these persons hereafter. P.w.12 is the doctor who proved that the death of Jakir was homicidal.

15. P.w.11 is Sanjay Bendale, his evidence is at Exh. 32, who at the relevant time was working as PSI and was attached to Nagpada police station. He states that on 13-9-1993 he was station house officer on duty at Nagpada police station when he received information from the control room that maramari was going on at stable street within the jurisdiction of Nagpada police station. He then says that he made station diary entry which he produced as entry no.58. in SDE No.21/93 of Nagpada police station, which was taken on record as Exh.P-33. In his evidence he has stated that he received information from the control room at 17.35 hours i.e. at 5.35 in the afternoon. He says that he made entry in the book which is produced and exhibited. If we see entry at page No.194 being Exh. P-33/A it says the time 15.50 hours i.e. 3.50 in the afternoon,

day 13-9-1993, remark left (ravana) for enquiry. The entry is either wrong or statement is incorrect. Exh. P-33/A at page 194 is a zerox copy of Ex.P-33 as deposed by this witness. According to this witness when he reached near municipal chawl, he came to know that the injured is shifted to J.J. hospital. He therefore went there and came to know that Jakir was declared dead before admission. He then scribed inquest report and took charge of the clothes of the victim and he has written necessary documents which he has proved. Exh.P-34 is the copy of Exh.P-33 which is the entry in the station dairy. The entry shows that at 17.30 hours he scribed inquest report and noted death of the victim and then body was sent for autopsy. This entry is of 17.30. Exh.34 is of 15.50 hours, It took approximately two hours therefore for this officer to complete the police formalities and yet he says that he received information regarding maramari for the first time at 17.50 hours in his deposition. This witness in his cross examination has admitted that when he went to the spot after receiving information about the incident, he was at the spot for about two minutes and he did not see P.w.13 on the spot at that time. He nowhere speaks of seeing any arms or weapons at the spot when he visited. According to P.w.3 the assailants had dropped the arms on the spot. it is at 7.15 in the evening and that they seized the weapons

lying there. It will be seen that according to P.w.3 the weapons were lying on the spot since around 3.30. Police did visit the spot around 5.30 and yet the seizure was not effected. It is effected only at 7.15. The delay in effecting the seizure further creates doubt regarding veracity of the entire incident taking place in the manner as alleged by the prosecution.

16. P.w.13 is Dhavale who was P.I. attached to Nagpada police station and was on the relevant day in charge of duty at Nagpada police station. He says that he came back to the police station from TADA court around 4 p.m., learnt about the incident and immediately rushed to the stable street and while so doing he made entry in the station diary. He proves it as entry No.61 Exh.48. It noted the time of departure as 16.05 hours. By 4.30 this witness was therefore at the spot, and yet there is no seizure till 7.15. He then says that after reaching the site he met all the eye witnesses and brought them to the police station and recorded their statement in the police station. The statement of Manjoor was treated as FIR. The witness then says that thereafter he along with P.w.11 again went to the scene of offence to draw spot panchanama. It is obvious from the deposition of this witness therefore that he visited the spot twice, one around 4.30 and then around 7.00 in the evening but he

did not notice the weapons lying on the spot when he first visited, but collected the eye witness and took them to the police station. If he has seen it, he did not think it necessary to seize the weapon first before rounding up the witnesses alleged to be eye witnesses to the police station, record their statement and came back for seizure of the weapon lying there. This conduct of the investigating officer raises serious doubts regarding the conduct of investigation by the police in this case. Then the witness speaks of arrest, test identification parade.

17. This is therefore is the entire evidence on the basis of which the learned trial Judge convicted the accused persons. We are unable to agree with the finding given by the learned trial Judge and our reasons are as under:

18. The testimony of the so called eye witnesses that is P.ws 1,2 and 3, 6 and 8 are contradictory and if any one of them is believed the other will have to be disbelieved. For example, P.w.1 says that accused no.1 was not there whereas the other witnesses insists that accused no.1 was there and he tripped the victim. P.w.2 attributes weapon specifically to the accused but P.w.3 fails to notice and told the court who was handling which weapon. P.w.6 also does not attribute

which weapon to any accused but states that they were thrown at the spot by the accused persons after the assault. There is no reason brought on record by the prosecution as to why these persons were chasing Jakir. There is no explanation whatsoever why Jakir who was sitting in the library, reading paper, got up and seeing the mob started running away from there. The testimony of P.w.1 if accepted, will go to show that the incident could not have seen from where P.w.1 was standing, if it takes place before Iqbal Restaurant. Thereafter P.ws. 2 and 3 were examined by the prosecution and they saw the incident from Islamic Restaurant and then proceeds to incriminate the accused persons.

19. There is unexplained delay in seizure of the arms which were lying on the spot. The occurrence is of the year 1999 and yet there is no explanation why assistants of finger print expert were not taken for connecting the accused with the weapon allegedly used in the crime. It has come in the deposition of investigating officer P. w. 13 that he went to the spot, round up eye witnesses and brought them to the police station for recording the statement as the Muslim area is sensitive and he apprehend communal right, though in the cross examination he states that there is no communal right. Infact the assailants who

assaulted the victim, all of whom, were Muslims. There is no reason why such assault was undertaken. The locality was Muslim dominated, the residents inhabitants were Muslims. Witnesses have stated that weapons were lying there and yet it is not clear why they were not seized when the police first visited the spot. There is no explanation of the unreasonable delay in effecting seizure.

20. It is pertinent to note that the seizure is from the open site. Infact the weapons were allegedly lying on the street, four hours time have lapsed since dropping of the weapon there, as described by P.w.3 and seizure thereof by P.w.13. The possibility of the weapon being put there at the site after the assault was over cannot be over ruled. All these reasons as mentioned aforesaid therefore create a reasonable doubt in the minds of a prudent man that the police are not coming forward with what exactly has happened. Either because they do not know what happened or they wanted to some how register a crime.

21. In our opinion, in the face of such contradictions existing in the ocular testimony and in the face of such grave latches on the part of police in the matter of seizure, holding of test identification parade, identification of witnmesses, bringing them to the

police station for recording their statement, it is impossible to come to a conclusion that the prosecution has proved beyond reasonable doubt that it was the accused persons who have committed murder of deceased. For these reasons therefore we are unable to agree with the learned Sessions Judge. In the result therefore the appeal succeeds and is allowed. All the accused persons are acquitted of all the charges framed against them. Conviction of all kind as mentioned above is set aside. The accused are liable to be released forthwith if they are not required otherwise.

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